August 6, 1952
Op. No. 52-228

Mr. Earl F. Hastings
Director Securities Division
Arizona Corporation Commission
Phoenix, Arizona

Dear Mr. Hastings:

We have your letter of July 1, 1952, wherein you request an opinion from this office concerning the solicitation of savings accounts in Arizona on behalf of F.D.I.C. insured building and loan associations domiciled in states other than Arizona. Your letter in part states:

> "A local solicitor proposes to seek, on behalf of one or more such foreign building and loan companies, funds which he would transmit to such companies. The companies would forward their official receipts to the original contributors and credit the solicitor with a percentage commission. The contributions would be subject to withdrawal provisions of the respective companies, which provisions usually include a 30-day withdrawal notice and are similar to a bank savings account in other respects."

You ask the following questions:

"1. Is the local solicitation of deposits on behalf of a foreign building and loan association a savings bank transaction subject to the supervision of the Superintendent of Banks?

2. Is the local solicitation of such deposits, if not as a savings bank transaction, otherwise subject to supervision by the Superintendent of Banks?

3. If item 1 and/or 2 are in the affirmative would not the securities or securities transactions be exempt from registration with the Corporation Commission?

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cc: Superintendent of Banks
State Banking Department

4. Is the local solicitation of such deposits a function of the foreign building and loan corporation which would constitute doing business and thereby be prohibited by law?

5. If item 4 is in the affirmative would not the Corporation Commission be incapable of accepting for registration the securities involved?

We wish to further inquire if the same or similar response to the above questions would be applicable to a foreign savings and loan company."

In answer to your first question, it is our opinion that the local solicitation of deposits by a foreign building and loan association would not be a savings bank transaction subject to the supervision of the Superintendent of Banks.

Section 51-107 ACA 1939 provides:

"Institutions subject to examination.-- All banks, building and loan associations, all loan and trust companies and all security companies shall be under the jurisdiction and supervision of and subject to examination by the superintendent or an examiner."

In construing this section we must presume the Legislature only intended to legislate concerning supervision of banks, building and loan associations, etc., that come within the jurisdiction of the State of Arizona, that is, banks, building and loan associations, etc., that are doing business in the State of Arizona.

Section 51-617 ACA 1939 provides:

"Foreign associations excluded.--No foreign corporation shall be admitted or allowed to transact the business of a building and loan association within this state or maintain an office in the state; nothing here, however, shall affect any contract heretofore made between any resident of this state and any foreign corporation, but all funds collected from such contracts shall be invested as required herein of domestic associations, and such foreign corporations may issue in connection with loans made under its contract an amount of its stock equal to the loan."

Since this section prohibits a foreign building and loan association from transacting business in this state, and since the superintendent of banks only supervises building and loan associations doing business in this state, foreign building and loan associations would not come under the supervision of the superintendent of banks.

Your second question reads:

> "Is the local solicitation of such deposits, if not as a savings bank transaction, otherwise subject to supervision by the superintendent of banks?"

In answer to this question it is our opinion that a foreign building and loan association, irrespective of what business it is doing within the state, would not come under the supervision of the Superintendent of Banks for the same reason given in answer to question No. 1.

Your third question is:

> "If item 1 and/or 2 are in the affirmative would not the securities or securities transactions be exempt from registration with the Corporation Commission?"

You will note that the answers to items 1 and 2 are not in the affirmative and therefore it is our opinion that the securities transactions would not be exempt from the registration with the Securities Division of the Corporation Commission under the provisions of Paragraph (c) of Section 53-404 ACA 1939, which exempts securities issued by a building and loan association subject to supervision by an agency of this state. It is our opinion however that such securities would be exempt under the provisions of subdivision (a) of Section 53-1404 ACA 1939, as amended, which provides:

> "Securities issued or guaranteed by the United States, or by any state, territory or insular possession thereof, or by any political subdivision of any state, territory or insular possession, or by the District of Columbia, or by any agency or instrumentality of one or more of any of the foregoing."

This section would exempt security transactions from registration if such deposits with federally insured foreign building and loan associations did not exceed the maximum amount which is federally insured.

Your fourth question is a very difficult one to answer. Whether certain acts of a foreign corporation constitute doing business in

this state depend on the facts in each case viewed in the light of the issue involved.

In Vol. 23 Am. Jur., at page 380, the general rule is stated to be as follows:

> "In general, the authorities may be said to support the proposition that the mere solicitation of business in a state by agents of a foreign corporation does not constitute doing business therein. * * *"

Also, at page 383, 23 Am. Jur., it is stated:

> "The general rule that solicitation of business does not ordinarily constitute doing business is, however, usually not changed by the fact that the orders are solicited through a local broker or commission merchant, or by the fact that the corporation or its agent maintains an office or place of business in the state solely in the furtherance of such solicitation, although this, in connection with slight additional activity, may be sufficient where the issue is that of amenability to process. * * *"

In Vol. 146, A.L.R. at page 942, there is an annotation upon this point. The general rule therein stated is:

> "The proposition, as stated in the earlier annotations, that the soliciting of orders for goods within a state by the agent of a foreign corporation, and the shipment of goods pursuant to such orders by the corporation from another state to the purchasers, do not constitute doing business within the state so as to subject the corporation or its agent to a local statute prescribing conditions of doing business within the state, such transactions being interstate commerce and not subject to state regulations, is supported by the following later cases: * * *"

Arizona is listed as one of the states following this general rule. However, the Arizona case cited as supporting this proposition is

Weber Showcase & Fixture Co. v. Co-Ed Shop, 47 Ariz. 415, 56 P. 2d 667, which concerns the sale of a showcase by a California corporation. Such case is only vaguely within the annotation and not at all applicable to the present question.

The rules heretofore quoted apply to foreign corporations in general. Do the same rules apply to foreign building and loan corporations? In Vol. 35, A.L.R., at page 626, the following statement is made:

> "It is thought that the sale of building and loan stock by a foreign association or corporation presents a different problem with respect to doing business from the ordinary sale of corporate stock, the former ordinarily being intimately associated with the lending of money, and perhaps other acts not attendant upon the sale of stock in a corporation whose business does not consist in the mere lending of money. The case of Sullivan v. Sheehan (1898) 89 Fed. 247, involved the question whether the sale of building and loan stock by a foreign corporation was doing business within a state statute. That case, and possibly others on the same subject, is not considered in the annotation."

However, in reading the Sullivan v. Sheehan case, we find no different rule applied than those stated above. The question in the Sullivan case was whether or not an Illinois building and loan association prohibited from doing business in Minnesota could recover on a loan made to a Minnesota resident. The court stated:

> "A loan negotiated by a resident of a state on property situated therein from a foreign building association prohibited by the state laws under penalties from doing business in the state, is valid, and the security enforceable, where the contract was made in another state."

In the case of Marchant v. National Reserve Company of America, 137 P. 2d 231, the Utah court had before it the question of, when is a foreign building and loan association doing business in Utah. The court reviewed numerous cases on the subject, making no distinction between building and loan associations and other foreign corporations. At page 237 the court stated:

> " * * * that neither isolated business transactions (Hunter v. Mutual Res. Life Ins. Co., 218 U.S. 573, 31 S. Ct. 127, 54 L. Ed. 1155, 30 L.R.A.N.S., 686), nor the mere solicitation of business (Green v. Chicago Burl. & Q. Ry. Co., 205 U.S. 530, 27 S. Ct. 595, 51 L. Ed. 916) * * * * * will amount to the presence of the corporation. * * * "

This particular case was decided on the issue of an isolated transaction and did not go into the question of what constituted soliciting business.

Inasmuch as we have found no case holding that building and loan associations do not fall within the general rule applied to other foreign corporations, concerning the question of doing business in the state, it is our opinion that the general rule must be applied. Thus, specifically answering your question, where a foreign building and loan association does nothing more than is set forth in your letter, we do not believe it would be doing business in Arizona and therefore would not be in violation of Section 51-617 ACA 1939. What additional acts by the corporation would be sufficient to constitute doing business in the state is a question that must be answered in each individual case when such question arises.

In this connection however it should be pointed out that Section 51-618 ACA 1939 provides:

> "Soliciting for foreign association prohibited.--Penalty.--Any person who shall solicit investments or issue or deliver any certificate of stock in this state for or on account of any foreign building and loan association, shall be guilty of a misdemeanor. No person shall use the name of a building and loan company unless complying with the provisions of this article. Any such person using a name embodying any combination of the words 'building and loan association,' or acting as agent for such person, shall be guilty of a misdemeanor."

Even though it is our opinion that a foreign building and loan association doing the acts set forth in your letter does not appear to be doing business in the state of Arizona, Section 51-618 prohibits any person in the State of Arizona from soliciting investments for or

on account of any foreign building and loan association. Thus the modus operandi stated in your letter could not be legally carried on.

Your question No. 5 reads:

> "If item 4 is in the affirmative would not the Corporation Commission be incapable of accepting for registration securities involved?"

Our answer to item 4 was not in the affirmative and, inasmuch as in our answer to item 3 we stated that such securities transactions would be exempt under Paragraph (a) of Section 53-404, supra, this question need not be answered.

Your last question is whether or not our response to the above questions would be applicable to a foreign savings and loan company.

Section 51-602 ACA 1939, as amended, provides:

> "The name of the association, which shall not too closely resemble that in use by any existing corporation of this state. The words 'building and loan association' or 'savings and loan association' shall form a part of the name, and no person, not organized hereunder, shall use a name embodying either of the above combinations of words, except associations now existing."

In any state having similar statute or where a savings and loan company is in effect a building and loan association, the answer to the questions in your letter would be the same concerning a foreign savings and loan company. In the event a foreign savings and loan company does not do the same business as a building and loan company and is in fact not a building and loan company but a savings bank or some other savings institution, then at least part of the answers to the above questions would be different and not applicable to such an institution.

We trust the foregoing satisfactorily answers your questions concerning these matters.

Very truly yours,

FRED O. WILSON
Attorney General

KENT A. BLAKE
Assistant Attorney General

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